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Climate change litigation as a means to address intergenerational equity and climate change

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Abstract *Over the years human activities have increased the emissions of greenhouse gases resulting in changes in the global climate. Most of the consequences of these changes will be seen in the years to come. Climate change does not only challenge the survival of subsequent generations but also has implications for intergenerational justice. Taking into consideration that the well-being of future generations rely upon the actions of present generations, the question of whether the former have rights over the latter is major. The theory of intergenerational equity addresses this issue. For years, the notion of intergenerational equity has had an ethical dimension, but recent litigation gave it bones and structure. This article connects established theories of intergenerational justice to the recent climate cases. By analysing significant national, regional, and international case law, this article examines whether climate change litigation can promote intergenerational equity and combat climate change itself. No absolute answer is provided, as this article accepts its limitations and criticism, particularly regarding the barriers in litigation against private corporations. However, in light of recent events, the author of this article remains optimistic, as despite the lack of success in court, the adjudicated cases have positively contributed to the development and recognition of intergenerational rights in climate change law.*

1. Introduction

The prevalence of food poverty, poor sanitation, preventable diseases, population migration, extreme weather conditions, scarcity of safe drinking water, and lack of adequate shelter confirm the statement that 'climate change is the biggest global health threat in the 21st century'.[1] According to the Intergovernmental Panel on Climate Change (IPCC), human [illegible] fossil fuels, land

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[1] Costello A, Abbas M, Allen A, Ball S, Bellamy R, et al., '*Managing the health effects of climate change*', (2009), Lancet and University College London Institute for Global Health Commission, 373:1693–733.

[2] IPCC, Impacts, adaptation and vulnerability, Contribution of working group to the fourth assessment report of the Intergovernmental Panel on Climate Change, (2007), Cambridge University Press, p. 976.

use, and agricultural activities lead to an enormous increase in the concentration of greenhouse gases over the last 250 years.[3]

Climate change will have a substantial effect on the health and survival of the next generations among 'already challenged populations.'[4] It challenges global equity and justice. Not all states are equally responsible for the changes in global climate, and whilst the highest percentage of gas emissions comes from industrialized countries, it is the less developed countries that will suffer the most.[5] However, the inequality does not end there. As Edith Brown-Weiss states, 'no longer can we ignore the fact that climate change is an intergenerational problem, and that the well-being of future generations depends upon actions we take today.'[6] Climate change not only challenges justice between present and future generations but between different communities within future generations as well.[7]

Intergenerational justice embodies the duties the present generation owes to future generations to preserve a natural environment capable of sustaining life and civilisation to at least the same quality of today. In intergenerational ethics these duties may include responsibilities related to older generations, like social security (where younger working populations secure financial and social benefits for the elderly) or reparations (where compensation to a deceased former generation for an injury done to it); and duties related to future generations (as the duty of the parents to care for their children), or with respect to climate change, the obligation the present generation has, not to cause pollution that will injure unborn future generations.[8]

Regarding intergenerational equity there is one fundamental question: what are the exact rights that future generations are entitled to, and are they moral or legal?[9] There have been several ethical discussions related to intergenerational equity, but an ethical analysis is

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[3] Ibid.
[4] Rylander C, Odland JO, Sandanger TM, '*Climate change and the potential effects on maternal and pregnancy outcomes: an assessment of the most vulnerable the mother, fetus, and newborn child*', 6 (2013), Global Health Action, 19538 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3595418/.
[5] Frank Bierman and Ingrid Boas, '*Protecting Climate Refugees: The Case for a Global Protocol'* (2008), Environment Science and Policy for Sustainable Development, Environment 50, p. 13; Henry Shue, '*Climate Justice: Vulnerability and Protection'*, (2014) Oxford University Press, p. 4, 205.
[6] E. Brown Weiss, '*Climate change, intergenerational equity, and international law'*, (2008), Vermont Journal of Environmental Law, 9(3), p. 616.
[7] Ibid, p. 619.
[8] Solum L.B., '*To Our Children's Children's Children: The Problems of Intergenerational Ethics',* (2001/2002), 35 Loyola Los Angeles Law Review 163, p. 173.
[9] Fitzmaurice Malgosia, '*Contemporary Issues in International Environmental Law*', (2009), Edward Elgar Publishing, p. 120.

beyond the scope of this paper. Although the fundamental theories will be shortly presented, the focus will be on the search for the legal basis for the rights of future generations. In opposition to the obligations of the present generations towards the future generations, there is no explicit recognition of the rights of future generations in international environmental law, despite few exceptions that will be outlined in the following section. Thus, an important pool of legal content will be found in litigation.

To examine whether climate change litigation can be an effective remedy in the fight against climate change, and to promote intergenerational equity, cases from international, regional and domestic courts will be evaluated. Considering that international climate change litigation faces several barriers and is not an effective tool in promoting intergenerational equity, the importance and relevance of domestic and regional climate litigation will be highlighted. Climate change litigation can be sorted into human rights litigation against governments and litigation against private corporations. By reviewing some landmark cases, it will be assessed whether litigation can be an effective means of adequately addressing climate change and intergenerational injustice.

1.1. Historical background

Deliberation over the fate of future generations and the impulse to preserve our planet in trust for those generations are not new notions. Intergenerational equity is part of the justice theory with roots in the distant past. One of the most influential theories on intergenerational justice was developed by John Rawls in 1971, which then stimulated the theory of E. Brown Weiss, that constitutes a fundamental theory in intergenerational ethics.

Rawls' theory was based on a thought experiment, occurring under a 'veil of ignorance' according to which rational people, standing in the original position, would decide the principles that would form existing inequalities.[10] Rawls supported the idea that participants would settle for principles based on which inequalities would be acceptable only to the extent that 'the least advantaged enjoyed the greatest benefit,' as any participant could be born into the less favourable group.[11]

[10] Rawls John, '*A theory of justice*' (1971), Cambridge Mass., Revised Edition (1999), Belknap Press of Harvard University Press, p. 140.
[11] Peter Lawrence, '*Justice for Future Generations'*, (2014), Climate Change and International Law, Edward Elgar Publishing, p. 51.

Brown Weiss extends Rawls' theory in a different direction. She suggests that if each generation did not know beforehand when it will be located in the spectrum of time, it would choose a principle whereby each generation would want to inherit the planet 'in as good condition as it has been for any previous generation and to have as good access to it as previous generations'.[12] What is noteworthy is that Brown Weiss specifically asks for an equality principle, noting that 'the theory of intergenerational equity calls for a minimum level of equality among generations'.[13] Therefore, exploitation of natural resources is permitted provided that natural and cultural diversity is conserved and future generations' options are not restricted.[14] For Professor Brown Weiss, intergenerational equity is connected with the theories of trust and partnership among past, present and future generations.[15] Each generation keeps earth resources in trust for future generations, the latter being both the beneficiaries and the trustees holding natural resources for next generations. In their use of the planet, all generations are equal, and the partnership between them is a corollary to equality.[16] Intergenerational equity is based on the principles of conservation of options, quality and access to the planet's resources for future generations, which create the nexus of intergenerational rights and obligations that derive as moral obligations. These are then converted into legal rights and obligations existing among members of each generation and amid generations.[17]

Although the theory of intergenerational equity appears to be widely accepted as the general norm,[18]it was subject to a degree of criticism. First, it was argued that because future generations will consist of individuals who do not currently exist, they cannot have any rights. Secondly, it was suggested that it would be irrational to presently interfere in actions that will affect future generations, as it is unknown what the consequences and subsequently the needs (for psychological or physical make-up) would be for these generations as a result of that interference.[19] Additionally, the legal content of intergenerational equity was challenged, as equity by definition pursuits to ameliorate the effect of legal rules upon already existing legal

[12] E. Brown Weiss, '*In Fairness to Future Generations: International Law, Common Law Patrimony and Intergenerational Equity'*, (1989), p. 24.
[13] Ibid.
[14] Ibid, p. 41-42.
[15] Fitzmaurice, supra note 9, p. 123.
[16] Ibid.
[17] Ibid, p. 124.
[18] Burns H. Weston, '*Climate Change and Intergenerational Justice: Foundational Reflections'*, 9 VJEL, p. 396.
[19] A. D'Amato, '*Do We Owe a Duty to Future Generations to Preserve the Global Environment'*, (1990), 84 AJIL p. 92–194.

obligations and rights of individuals; thus, according to some authors, future generations could not enforce their own rights, even if they had *locus standi* in international law.[20]

The standing of future generations has long been the subject of legal dialogue. Questions concerning what should be distributed or preserved for future generations have flourished through academic literature.[21] The possibility of representing future generations, who do not currently exist and cannot express their interests or select representatives, has prompted notions of institutionalizing representatives for future generations (through a body representing future generations into the political system) and surrogate representation (which includes representatives that have not necessarily been elected by those who they represent).[22] Brown Weiss has noted that the standing of an individual is not important in forming the rights of future generations, as intergenerational equity is a group right.[23] Rawls on the other hand focuses on how fair distribution should be estimated, arguing for a 'fair share' or 'just saving' question (that is, how much present generations should keep in the benefit of future generations), measurements of which may have different interpretations.[24]

It is the author's view that ambiguity relating to the standing of an individual should not prevent us from forming the rights and interests of future generations as the law often deals with future threats, even where there is no present severe threat.[25] For instance, the safety of the foetus might prevail over the right of autonomy of the pregnant woman even though the foetus obtains legal status and rights only after it is born alive.[26] One may argue that environmental harms to future generations differ because there is no present threat (severe or otherwise) but only a future one. However, rising temperatures, melting ice-glaciers and land loss as presented at the beginning of this article already pose great dangers to many populations. As the moral philosopher Henry Shue stated 'we ought not to discount the seriousness of an outcome at all on the basis of its probability or uncertainty' if it is very likely to happen and

[20] V. Lowe, '*Sustainable Development and Unsustainable Arguments*', in A. Boyle and D. Freestone, "International Law and Sustainable Development: Past Achievements and Future Challenges" (1997), p. 27.
[21] Vrousalis Nicholas, '*Intergenerational Justice'*, in "Institutions for Future Generations" Iñigo González-Ricoy and Axel Gosseries (eds.), (2016), Oxford University Press.
[22] Anja Karnein, '*Can we Represent Future Generations?'* in "Institutions for Future Generations" Iñigo González-Ricoy and Axel Gosseries (eds.), (2016), Oxford University Press.
[23] E. Brown Weiss, '*Our Rights and Obligations to Future Generations for the Environment'*, (1990), 84 AJIL p. 204.
[24] Burns H. Weston, supra note 18, p. 409.
[25] Ibid, p. 402.
[26] Samantha Halliday, '*Autonomy and pregnancy: a comparative analysis of compelled obstetric intervention'*, in Sheila A.M. McLean (Ed.), (2016), Biomedical Law and Ethics Library, p. 5.

may cause losses extremely disproportionate to the costs of prevention.[27] Failing to deal with climate change due to lack of standing would signify not only a failure to help future generations, but actively causing them harm.[28]

Even if an ethical discussion is not within the scope of this paper, it is important to present the above stated theories for better understanding of the concept of intergenerational equity within a legal context. Besides, according to Brown Weiss, the theory of intergenerational equity finds its roots in general international law, at the United Nations (UN) Charter and the Preamble of the Universal Declaration of Human Rights (UDHR).[29] In general, apart from these two principal international agreements, multiple international environmental agreements, in addition to soft-law documents drafted years ago, incorporate, at least in the Preamble, a statement for future generations.[30] Among them, the *Stockholm Declaration on Human Environment* and the *Rio Declaration on Environment and Development* recognise the need to safeguard the 'natural resources of the earth' in order to 'equitably meet developmental and environmental needs of present and future generations.'[31] More recently, a strong provision on intergenerational equity is established in the *Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management,* which acknowledges the intergenerational implications of nuclear waste and requests that Parties avoid enforcing 'undue burdens' on future generations, including burdens that are greater than those imposed on the present generations.[32]

However, certain environmental treaties may not always be enforceable when fighting for intergenerational equity, as they may generate principles, but not rules.[33] Therefore, the impact of litigation is even greater as it can apply the principle of intergenerational equity in practice. The first case where this was successfully applied, though in conjunction with the

[27] Henry Shue, Climate, '*A Companion to Environmental Philosophy'*, in Dale Jamieson ed., (2001), p. 19.
[28] Ibid, p. 450.
[29] Brown Weiss, supra note12, p. 24; UN, Charter of the UN, 24 October 1945, 1-UNTS-XVI; UN General Assembly, UDHR, 10 December 1948, 217-A-(III).
[30] See, e.g., the *International Convention for the Regulation of Whaling*, (1946), 161 UNTS 72; the *1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals*, (1979), 19 ILM (1980) 15; the *Convention on International Trade in Endangered Species of Wild Flora and Fauna*, (1973), 12 ILM 1085.
[31] Principle 2 of the *Stockholm Declaration on Human Environment*, 11 ILM (1972) 1416; Principle 3 of the *Rio Declaration on Environment and Development*, 31 ILM (1992) 874.
[32] Article 1, *Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management*, 36 ILM (1997), at 1436.
[33] Boyle A, '*Some Reflections on Relationship of Treaties and Soft Law*', in V. Gowlland-Debbas (ed.), Multilateral "Treaty-Making: The Current Status of Challenges to and Reforms Needed in the International Legislative Process", (2000), p. 32.

right to a healthful environment, was the *Minors Oposa* claim in 1993.[34] The plaintiffs were minors, representing themselves and unborn generations, and requested to cancel registered permits issued based on the Timber Licensing Agreements (TLAs), as well as to cease issuing new ones, as they permitted deforestation. They found legal ground on the right of balanced and healthful ecology, as established in the Constitution of the Philippines. The case was dismissed by the Court in first instance for a lack of standing among other reasons. However, the Supreme Court gave the petitioners *locus standi* and stated that:

> *'Each generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology […] The minors' assertion of their right to a sound environment, at the same time, performance of their obligation to ensure the protection of that right for the generations to come.'*[35]

Nevertheless, the Supreme Court's ruling was subject to criticism, as it did not cancel any TLAs, but only ordered the case to be remanded for trial with TLAs holders while the Philippine forests continued to be denuded.[36] Although the Court's statement recognised the intergenerational element through the constitutional right to a healthy environment as an *obiter dictum,* it presented no binding precedent.[37] While the constitutions of numerous States incorporate provisions referring to future generations, the *Minors Oposa* case is one of the few existing examples where intergenerational justice and the constitutional right to a clean environment converged.[38]

At the international level, the concept of intergenerational justice has been discussed with regards to long-lasting effects of nuclear power. In the *Nuclear Test II* case,[39] Judge Weeramantry, in an effort to recognize the rights of future generations and the obligations of

[34] *Minors Oposa* v *Secretary of The Department of Environment and Natural Resources (DENR)*, Supreme Court of the Philippines, [1993], 33 ILM (1994), at 173.
[35] Ibid, at 185.
[36] A. de la Viña, '*The Right to a Sound Environment: The Case of Minors Oposa v Secretary of Environment and Natural Resources'*, (1994/IV), 3 RECIEL p. 459-460.
[37] Fitzmaurice, supra note 9, p. 140.
[38] Ibid, p. 148-150.
[39] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand* v *France) Case*, Order of 22 September 1995 (Dissenting Opinion of Judge Weeramantry) [1995] ICJ Rep. 317, at 317–62.

the States to protect them, stated that considering the long-term consequences of nuclear testing,

> *'this Court must regard itself as a trustee of those rights in the sense that a domestic court is a trustee of the interests of an infant unable to speak for itself [...] New Zealand's complaint that its rights are affected does not relate only to the rights of people presently in existence [...] [but also] include[s] the rights of unborn posterity [...] rights which a nation is entitled, and indeed obliged, to protect."*[40]

Further, it is worth mentioning the *Nuclear Weapons Advisory Opinion*,[41] where the Court noted that 'Ionising radiation has the potential to damage the future environment, food marine ecosystem, and to cause genetic effects and illnesses to future generations.' This showed that in shaping its opinion, the Court would weigh the possible damage caused by nuclear weapons not only to generations afterwards but to 'all civilisation and the entire ecosystem of the planet.'[42] Regrettably, the Court did not explicitly rely on the principle of intergenerational equity, nor did it explicitly recognise the rights of future generations.[43] Thus, issues related to the legal position of future generations remained unresolved.

Litigation shows that throughout the years, mankind has interfered with nature without considering the consequences upon the environment.[44] Gradually, new scientific insights increased the awareness of the potential risks for present and future generations.[45] However, as demonstrated, it is not enough to only recognise the risks or interests of future generations. There is a need to give a respectable legal context to their rights and obligations towards them, especially when taking into consideration the enormous impact that climate change will have on generations to come. As the following section will try to show, climate change litigation creates the necessary path towards successfully achieving that goal.

1.2. Litigation

[40] Ibid, at 341.
[41] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep. 226, 144-5, 177.
[42] Ibid, paras 29, 55.
[43] E. Brown Weiss, '*Opening Doors to the Environment and to Future Generations*', in L. de Chauzournes and P. Sands (eds), "International Law, International Court of Justice and Nuclear Weapons" (1999), p. 349–50.
[44] Case Concerning the Gabčikovo-Nagymaros Project (*Hungary* v *Slovakia*), [1997] ICJ Rep. 7, at 77–8, para 140.
[45] Ibid.

Although intergenerational equity made its first appearance as a theory in the world of ethics, nowadays it has practical impacts as evidenced by multiple case law, and plays an important role in climate change litigation. Over the last years, climate change litigation has vigorously increased in many countries around the world.[46]However, because climate change has multiple causes and effects, there is no universally accepted scope of climate change litigation. Climate change litigation therefore must have a climate change argument which 'is explicitly presented as part of the claimant's or defendant's case'.[47] The cases that are examined, hence include a climate change argument in relation to the rights of future generations or the obligations towards them.

2. International litigation

Apart from cases related to nuclear power, as aforementioned, climate change litigation before international courts, such as the International Tribunal for the Law of the Sea (ITLOS) and the International Court of Justice (ICJ), is extremely limited, and has a relatively small impact in comparison to the remarkable public attention disputes before these courts gather.[48]

The relatively modest size of international climate change litigation is due to the fact that climate change is the consequence of a number of factors and its effect is transboundary. As the jurisdiction of cases before the ICJ is based on the concept of consent, all States involved should have given their consent to stand before the Courts.[49] Accordingly, without any form of consent, disputes among States before the ICJ or ITLOS are hindered. Hence, the biggest obstacles towards international climate change litigation could be primarily political rather than legal.[50]

One case in which the ICJ was found to lack jurisdiction was that of *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament,* in 2016.[51] In that case, the Republic of the Marshall Islands filed applications

[46] Setzer Joana and Byrnes Rebecca, '*Global trends in climate change litigation: 2019 snapshot'*, (2019), Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics, p. 3.
[47] Hilson Chris, '*Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back)'* in Fracchia and Occhiena (editors), "Climate Change: La Riposta del Diritto"*,* Editoriale Scientifica (2010), p. 422.
[48] Benoit Mayer, '*The International Law on Climate Change',* (CUP 2018), p. 238.
[49] Article 36 paras (1), (2) United Nations, *Statute of the International Court of Justice*, 18 April 1946.
[50] Mayer, supra note 48, p. 240.
[51] *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v *India), Jurisdiction and Admissibility,* Judgment, (2016), ICJ Rep 255.

against nine States, alleging violations of their obligations with respect to the early termination of the nuclear arms race and nuclear disarmament. Though all nine applications were related to the same subject, the Marshall Islands distinguished between those States which had recognized the compulsory jurisdiction of the ICJ in accordance with Article 36 (2) of its Statute, and the others, whose consent was yet to be given. After examining the statements in each of the cases, ICJ concluded they did not provide ground for dispute before the Court, and thus it did not have jurisdiction pursuant to Article 36 (2) to proceed to the merits of each of these cases.[52]

3. Regional & domestic litigation against governments

In contrast with international litigation, litigation deriving from regional or national courts plays an important role in combating climate change and promoting intergenerational equity. The subsequent climate change cases involve human rights claims and will be categorized in litigation addressing mitigation of climate change and litigation addressing adaptation and enforceability of existing goals. Further, cases addressing sustainable development and environmental impact assessment will be analysed to examine their contribution in ensuring intergenerational equity. Finally, litigation targeting the loss of biodiversity induced by climate change, which threatens the rights of smaller communities or indigenous people, will be considered.

3.1. Climate change litigation addressing mitigation

It can be argued that all climate change cases addressing mitigation support intergenerational equity as their aim is to reduce greenhouse gas (GHG) emissions, lower levels of pollution and consequently protect the environment and preserve natural resources for future generations.

One ground-breaking climate case that obliged a government to urgently change its regulations and significantly reduce its emissions in keeping with its human rights obligations was the *Urgenda* case.[53] In this case, the claimants – *Urgenda Foundation* and a group of almost 900 citizens- argued that the Dutch policy regarding the reduction of GHG emission was not in compliance with the State's international legal obligations and compelled the latter

[52] Ibid.
[53] *Urgenda Foundation* v *The Netherlands*, [2015] HAZA C/09/00456689 (24 June 2015); appeal decision October 2018 and decision of Supreme Court, 19/00135, 20 December 2019.

to reduce its emissions. The claimants argued that if the Dutch government did not impose further reductions on GHG emissions, it would violate Articles 2 and 8 of the European Convention on Human Rights, Article 21 of the Dutch Constitution, and the general duty of care in the Dutch civil code.[54] The District Court decided that the Dutch government breached its duty of care, which compels parties to take precautionary measures to mitigate a threatening situation, and ruled that the Dutch emissions in the year 2020 need to be at least 25% lower than those in 1990.[55] The State's case that the Court's ruling infringed the principle of the balance of powers was overruled by the Court of Appeal in 2018,[56] concluding that, in compliance to Articles 2 and 8 of the ECHR, the State was obliged to achieve a reduction of 25%, due to the risks of hazardous climate change that could have a serious impact on the lives and wellbeing of the citizens. Following this judgment, the Dutch government appealed to the Supreme Court, where the previous decision was upheld. The Court confirmed that the reduction of GHG emissions is crucial to limit global warming to 1.5^{o}C and to avoid the risk of irreversible changes to the ecosystems that would 'jeopardise the lives, welfare and living environment of many people all over the world, including in the Netherlands'.[57]

Urgenda underlined the political and social impact of climate change in the Netherlands and altered domestic climate change policy. To underline this decision's significance not only at a national but moreover at an international level, the United Nations High Commissioner for Human Rights (UNHCHR), M. Bachelet, commented that 'the decision confirms that the Government of the Netherlands and, by implication other governments, have binding legal obligations, based on international human rights law, to undertake strong reductions in emissions of greenhouse gases.' She continued noting that this decision should be a paradigm not only for low-lying countries but worldwide.[58] *Urgenda* demonstrated to Governments everywhere the need to take more ambitious climate action to protect human rights from the

[54] Ibid paras 4.35, 5.2-5.5.
[55] Ibid paras 4.54, 5.1.
[56] Setzer and Byrnes, supra note 46, at 6.
[57] *Urgenda*, supra note 53, Supreme Court's decision, paras 4.1-4.8.
[58] UN Office of the High Commissioner, OHCHR's Work On Human Rights And Climate Change, *'Bachelet welcomes top court's landmark decision to protect human rights from climate change'* https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx [Accessed 29 July 2020].

unfavorable effects of climate change.[59] It stimulated climate cases worldwide and based on its outcome similar claims followed.[60]

One of the cases where claims were based on the *Urgenda* judgment was the case of *Plan B Earth and Others* v *Secretary of State and Business, Energy and Industry Strategy*.[61] The action was brought by a British charity (*Plan B Earth*) and eleven individuals (aged 9 to 79) alleging that the Secretary of State violated the Climate Change Act 2008 by failing to revise its new 2050 carbon emissions reduction target in line with the Paris Agreement and latest scientific developments. Citing the District Court's decision in *Urgenda*, the plaintiffs argued that the State, when indicating measures for combating climate change, will have to consider that the costs of climate change 'are to be distributed reasonably between the current and future generations'.[62] The claimants emphasised the adverse impact of climate change that will affect different aspects of their lives. These included possible loss of life, severe health issues, property damage and personal decisions regarding their future, such as the commitment to have children taking into account the impending risks of climate change.[63] The High Court denied the application for judicial review and supported the State's case that the 2008 Act grants discretionary power and not an obligation to the Secretary of State, hence the latter did not breach any national or international obligation. The Appellate Court upheld that decision and did not find any error in the law regarding the alleged failure to exercise discretion to amend the 2050 target. Despite being unsuccessful, the case proves that the *Urgenda* judgment created a litigation precedent,[64] which can be a useful tool for transforming mitigation policies towards net-zero carbon emissions and thus securing the rights of the current and future generations.

The *Urgenda* precedent was further established by the case of *VZW Klimaatzaak* v *Kingdom of Belgium and Others*,[65] where a non-profit organisation requested that the Belgian government should aim to reduce GHG emissions by 40% lower than 1990 levels by 2020 and 87.5% lower by 2050. Up to the present moment, the court has ruled on procedural matters

[59] Cox Roger, '*A Climate Change Litigation Precedent: Urgenda Foundation* v *the State of the Netherland*s', (2016) 34 J.E.R.L, 143 (144).
[60] See *Union of Swiss Senior Women for Climate Protection* v *Swiss Federal Council and Others,* [2016]; *VZW Klimaatzaak* v *Kingdom of Belgium & Others*, [2014] [pending].
[61] *Plan B Earth and Others* v *Secretary of State and Business, Energy and Industry Strategy*, [2018]CO/16/2018.
[62] Ibid, para 146, reference at *Urgenda* supra note 53, para 4.76.
[63] Ibid, paras 18, 206.
[64] Ibid, paras 144,146; Cox, supra note 59.
[65] See cases supra note 60.

brought in by the Flemish region, which the regional government has appealed. The appeal was rejected in April 2018. Although the final judgement is pending, the *Klimaatzaak* case is important to demonstrate the impact that *Urgenda* has in recent climate litigation.

The outlined cases illustrate how litigation can be an effective tool towards fighting climate change and promoting intergenerational justice. They represent only a small selection of numerous cases pertaining to mitigation and confirm that such litigation has grown into a critical part of the climate change dialogue.[66] However, as the following cases will show, climate change litigation can not only be used as a remedy to address mitigation, but also adaptation and the enforcement of existing goals.

3.2. Litigation addressing climate change adaptation

Article 7 of the United Nations Framework Convention on Climate Change (UNFCCC) sets a frame of 'common but differentiated responsibilities' for States. Following the mitigation of GHG emissions, these responsibilities are completed with the support for national methods that counteract existing or forthcoming climate change harms ('adaptation'), incorporating social security, management of natural resources, and enforceability of existing goals and policy measures.[67] Therefore, subsequent to the litigation of climate change mitigation, litigation related to climate change adaptation is the second most important tool to combat climate change and ensure intergenerational equity.

Lately, due to the strong impact climate change has on displacement, climate adaptation litigation regarding "climate refugees" has increased.[68] Annually, about 25 million people are being displaced, internally or across international borders.[69] The high-profile case of *Mr. Teitiota* will help analyse the importance of adaptation litigation.[70] Mr. Teitiota, a national of the Republic of Kiribati, unsuccessfully applied for international protection under the refugee status in New Zealand 'on the basis of changes to his environment in Kiribati caused by sea-level-rise associated with climate change'.[71] Specifically, he argued that sea-level rise led to

[66] Jacqueline Peel and Hari M. Osofsky, '*A Rights Turn in Climate Change Litigation?*' (2018), 7 TEL 37, p. 106.
[67] Article 7 UNFCCC, May 9, 1992, S. Treaty Doc No. 102-38, 1771 UNTS 107.
[68] Mayer, supra note 48, p. 247.
[69] United Nations University, Institute for Environment and Human Security, *'Climate Change, Migration and International Justice*' (2018), https://ehs.unu.edu/media/press-releases/climate-change-migration-and-international-justice.html.
[70] *Teitiota* v *Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107; AF (Kiribati) [2013] NZIPT 800413.
[71] Ibid, AF (Kiribati), at 2.

contamination of fresh potable water and gradually land disputes. The Immigration Tribunal rejected his application noting that persecution under refugee law requests the implication of 'some form of human agency'.[72] While the Supreme Court upheld that decision, it also specified that it should not be interpreted in a way that 'environmental degradation resulting from climate change [...] could never create a pathway into the Refugee Convention'.[73] This last statement, which was also supported by the UN Human Rights Committee (UNHRC), can be an important step towards the recognition of "climate refugees" under international refugee law protection.

In January 2020, the UNHRC published its views on that case.[74] The key issue to decide in this case was whether New Zealand had erroneously or arbitrarily evaluated the alleged complaint on the applicant's violation of the right to life with his return to the country of origin.[75] The Committee, despite the strongly justified opposing opinions of two individuals,[76] concluded that the applicant had not demonstrated with sufficient evidence a clear arbitrariness or error in the domestic authorities' evaluation of a particular, existing or foreseeable risk of threat to life that violated his rights under article 6 of the Covenant.[77] Moreover, the Committee noted that even though there is a likelihood for the Republic of Kiribati to be rendered uninhabitable due to rising sea levels, there will be a timeframe of 10 to 15 years before that occurs, which would provide enough time "for intervening acts and affirmative measures" by the State and the international community to protect and, if necessary, relocate individuals.[78] This argument is rather disappointing considering that the contamination of water supply due to the environmental degradation is real and already negatively impacts the applicant's family health and economic situation, posing a foreseeable risk of a threat to their lives.[79] Waiting for more catastrophic events to meet a higher threshold of risk would be contradictory to the protection of life itself.

[72] Ibid, para 55.
[73] *Teitiota*, supra note 70, para 13.
[74] UNHRC, *Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2728/2016***, CCPR/C/127/D/2728/2016, (7 January 2020), UNHRCViewsCCPR/C/127/D/27/28/2016.
[75] Ibid, para 8.5.
[76] Ibid, Annex 1, *Individual opinion of Committee member Vasilka Sancin (dissenting),* and Annex 2, *Individual opinion of Committee member Duncan Laki Muhumuza(dissenting)*.
[77] Ibid, paras 9.13-9.14; International Covenant on Civil and Political Rights, 999 UNTS 171, 16 December 1966.
[78] Ibid, para 9.12.
[79] Ibid, Annex 2, *Duncan Laki Muhumuza*, paras 1, 2.

However, although the Committee had reached the same conclusion with the Judicial Authorities, it made some very progressive comments, which could affect forthcoming judgements. In paragraph 9.3, the Committee noted that the non-refoulement obligation pursuant to article 6 of the International Covenant on Civil and Political Rights (ICCPR) may be broader than the scope of the principle under international refugee law, as it might further involve the protection of foreigners not entitled to the refugee status.[80] This gives ground to include more individuals suffering from climate change consequences. Moreover, as all relevant facts and circumstances must be taken into account,[81] the right to life shall not be understood in a restrictive manner. According to the Committee, safeguarding that right obliges States to take positive actions.[82] Without 'robust national and international efforts,' the impact of climate change may threaten individuals' right to life and give rise to '*non-refoulement* obligations' of States in the future.[83] It is also the Committee's position that environmental degradation, unsustainable development and climate change present very serious threats to the ability of both the current and the future generations to enjoy the right to life.[84] These comments are highly significant and direct the path that a subsequent Court ruling may follow.

The case of *Mr. Teitiota* is one of numerous cases that address climate-induced migration. Even though that case was unsuccessful, it introduced significant arguments and created a pathway into protection from environmental degradation under the refugee law. It indicates that firstly, there is no universal definition of "climate refugees" and that secondly, those that are dislocated do not meet any definition in any international protection regime.[85] This will not change unless a broader scope of refugee status protection is accepted. The case gathered considerable media attention and the Court's ruling of environmental degradation possibly leading to refugee law protection can be used as a means to integrate migration into adaptation strategies.[86]

[80] UNHRC General comment No. 36 (2018) on article 6 of the Covenant on the right to life (CCPR/C/GC/36), para 31.
[81] See, inter alia, *X v. Sweden* (CCPR/C/103/D/1833/2008), para 5.18, http://hrlibrary.umn.edu/undocs/1833-2008.html.
[82] UNHRC *Views,* supra note 74, para 9.4.
[83] Ibid, para 9.11.
[84] General Comment No. 36, supra note 80, para 62.
[85] Lauren Nishimura, *'"Climate Change Migrants":Impediments to a Protection Framework and the Need to Incorporate Migration into Climate Change Adaptation Strategies'* (2015), 27 Int'l J Refugee L, 107, p. 114.
[86] Ibid, p. 129.

Climate adaptation litigation can also be used to enforce presented targets.[87] A significant case, used as a tool to enforce existing goals in addition to strengthening the link between climate change and human rights, is the case of *Future Generations v Ministry of the Environment and Others*.[88] The plaintiffs, twenty-five children and youth, along with the non-governmental organization "Dejusticia" sued the President of Colombia, the Ministry of Environment and Sustainable Development, the Ministry of Agriculture and Rural Development, all municipalities in the Colombian Amazon and a number of corporations. They brought the suit to enforce their rights to life, health, food, water and a healthy environment and to combat deforestation in the Colombian Amazon rainforest. The plaintiffs claimed that climate change in addition to the government's failure to cut down deforestation and comply with the net-zero deforestation target by the year 2020, pursuant to the Paris Agreement and the National Development Plan 2014-2018, jeopardizes the aforementioned fundamental rights. Hence, they filed a specific constitutional claim ("tutela") to enforce their rights.

The Lower Court's ruling was not in favour of the plaintiffs. An appeal was filed on 16 February 2018. On 5 April 2018, the Supreme Court reversed the Lower Court's judgment, underlining the need for protection of fundamental rights and found the Colombian government accountable for undue deforestation and GHG emissions. The Court, acknowledging that the 'fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem',[89] reinforced the link between human rights and the environment. Additionally, what is of utmost importance is that the Court made a specific reference on the rights of future generations noting that 'the increasing deterioration of the environment is a serious attack on current and future life and on other fundamental rights.'[90] It further acknowledged the Colombian Amazon as a 'subject of rights' similar to the Constitutional Court's recognition of the Atrato River.[91] Accordingly, the Colombian Amazon was entitled to protection, maintenance, conservation, and restoration.

[87] Setzer and Byrnes, supra note 46, p. 7.
[88] *Demanda Generaciones Futuras* v *Minambiente*, N.: 11001-22-03-000-2018-00319-01, Tribunal Superior de Bogotá (12 febrero 2018) [Lower Court], Tribunal Superior del Distrito Judicial de Bogotá (16 febrero 2018) [Appellate Court], Corte Suprema de Justicia, Sala de Casacion Civil, Republica de Colombia, Bogotá, D.C. (Avril 4th, 2018); English translation: *Future Generations* v *Ministry of the Environment and Others*, Supreme Court decision, STC 4360-2018 (April 4th, 2018).
[89] Ibid, *Future Generations*, Supreme Court decision, STC 4360-2018, p. 13.
[90] Ibid.
[91] Ibid, p. 45.

Hence, the government was ordered to prepare and implement action plans to address deforestation in the Amazon rainforest.[92]

The Colombian government failed to fulfil the imposed obligations as the deforestation was continued at the same rate, and thus the plaintiffs sought a declaration at the beginning of 2019.[93] Nevertheless, the contribution of that case to the fight for intergenerational equity is extremely important, as it did not only interpret the obligations of the Colombian government under the Paris Agreement but also the obligations towards future generations. It innovatively clarified that the protection of fundamental rights incorporates the unborn and set the basis of environmental rights of future generations on the 'ethical duty of solidarity of the species' and 'the intrinsic value of nature'. [94] Therefore, it established a direct link between the right to a healthy and sustainable environment and the rights of future generations, the former offering a solid legal context and reasoning for the latter.

Addressing climate change is problematic as its impact is enormous and can affect every aspect of human society. Thus, climate change litigation can sometimes address both mitigation and adaptation measures. Such is the case of *Juliana* v *United States*; [95] a land-mark case that addresses both climate change mitigation and adaptation and promotes intergenerational equity. The plaintiffs are twenty-one individuals, aged 10 to 19, along with two nonprofit organisations "Earth Guardian" and "Future Generations." The plaintiffs claimed that the US government had violated their constitutional rights to physical and mental health, life, liberty, and property, involving an asserted right under the Due Process Clause of the Fifth Amendment to a 'climate system capable of sustaining human life'.[96] They accused the US government of continuing to 'permit, authorize, and subsidize' fossil fuel use, disregarding its risks and thus causing severe climate change-related harms to the plaintiffs.[97] By failing to reduce GHG emissions the Government infringed a public trust obligation to preserve natural

[92] Ibid, p. 45, para 14.
[93] Setzer and Byrnes, supra note 46, p. 7.
[94] *Future Generations*, Supreme Court decision, STC 4360-2018, supra note 88, p. 18.
[95] *Juliana* v *The United States of America*, [filed on 2015], D.C. No. 6:15-cv-01517- AA, Court of Appeal, No. 18-36082, 9th Circuit, [pending].
[96] *Juliana*, Case:18-36082, 01/17/2020, ID:11565804, DktEntry:153-1, p. 11.
[97] Ibid, p. 12.

resources.[98] The Government repeatedly sought to dismiss the case by contesting the standing of the plaintiffs.[99]

The District Court rejected the Government's motion to dismiss the case, confirming that the plaintiffs had standing to sue, and stated a claim for infringement of the Fifth Amendment due process right, which the Court identified as to be free from devastating climate change that 'will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem.'[100] Though the court rejected the State's case regarding the lack of constitutional standing, the case is still pending due to procedural measures.[101] If the plaintiffs succeed, *Juliana* will oblige the US government to introduce a decarbonization policy and apply extensive changes in the US energy system.[102] Despite its status as pending, the case has already inspired other similar cases in different countries,[103] some of which are still pending.[104] Furthermore, the case boosts the government to amend its mitigation policy similar to the *Urgenda* case. Even if *Juliana* is not successful, it will still constitute a landmark lawsuit of enormous public attention that will enhance the fight against climate change and secure intergenerational equity.[105] Accepting that the plaintiffs have standing before the Court is an important step towards resolving the uncertainty of the legal standing of future generations that the aforementioned theories have presented, thereby addressing the biggest obstacle in intergenerational justice.

The cases analysed above demonstrate that climate change litigation constitutes a robust regulatory tool in addressing climate change and safeguarding human rights.[106] Climate change cases relating to mitigation can alter climate regulations, introduce new planning instruments and amend legislations. Mitigation is the first step towards maintaining a climate system 'capable of sustaining life', as stated in *Juliana*, and reducing climate change impact to fairly distribute its cost between the present and future generations, as stated in *Urgenda* and *Plan B*

[98] Peel and Osofsky, supra note 66, p. 55.
[99] *Juliana*, supra note 95, at 1248; Powers Melissa, '*Juliana* v *United States*: *The Next Frontier in US Climate Mitigation?*', (2018), 27 RECIEL, 199, p. 200.
[100] *Juliana*, Case 6:15-cv-01517-TC, Document 83, 11/10/16, p. 33.
[101] Powers, supra note 99, p. 200.
[102] Ibid, p.199.
[103] See above *Future Generations* v The *Ministry of the Environment and Others; Aji P. et al* v *State of Washington et al,* Case N.:96316-9, (2018).
[104] *Reynolds* v *Florida*, Case N.:2018-CA-819, (2018), [pending].
[105] Peel and Osofsky, supra note 66, p. 106.
[106] Ibid.

Earth. However, mitigation without adaptation cannot produce the anticipated outcome, as multiple cases illustrate that although States are obliged to act in compliance with their international obligations, they are reluctant to do so. Adaptation is necessary to address climate-induced migration and respect the rights of forcibly displaced persons such as Mr. Teitiota, or to protect the environment and the substantial rights of the unborn and future generations, as stated in *Future Generations.*

These cases reflect the multiple ways in which litigation can influence climate change policy making. Addressing the challenges that climate change presents, being a 'dual regulatory problem,' entails the creation of a uniform climate policy of a multi-level frame policy-making adaptation and interconnection between mitigation and adaptation measures.[107] Besides, climate change policy can only be effective when implemented through adaptation methods. The subsequent cases address climate change adaptation through the environmental impact assessment.

3.3. Litigation concerning sustainable development and environmental impact assessment

Climate change litigation in South Africa is significant, not only because Courts' rulings enforce existing climate legislation, but more importantly they establish new goals through the interpretation of existing legislation asking for additional climate change considerations.[108] The majority of those cases are related to regulatory challenges focusing on the authorisation of high-emitting projects, which is the result of an environmental impact assessment.[109] One particular example is the case of *Earthlife Africa Johannesburg* v *The Minister of Environmental Affairs and others*,[110] where the High Court determined that climate change is an important consideration when conducting the environmental review of a coal-fired power plant, called the "Thabametsi Project".

In that case, the claimant, *Earthlife*, a non-profit organisation appealed the environmental authorisation for the Thabametsi power project, which would be operating until at least 2061. The Minister of the Environment upheld the decision and then *Earthlife* requested

[107] Hari M. Osofsky, '*The continuing importance of climate change litigation*' (2010), 1 Climate Law 3, p. 11-12.
[108] Setzer and Byrnes, supra note 46, p. 9.
[109] Ibid, p. 27.
[110] *Earthlife Africa Johannesburg* v *The Minister of Environmental Affairs and others,* [2017], High Court of South Africa Gauteng Division, Pretoria, N.:65662/16.

to review both the decision granting the authorisation and the appeal decision of the Minister.[111] The Court was asked to consider whether the government had an obligation to conduct an assessment that would consider the potential environmental impacts to climate change, and whether climate change was a relevant consideration for environmental review under the Environmental Management Act 1998. The Court concluded that such considerations are relevant as, among other reasons, they are in line with South Africa's obligations under the Paris Agreement.[112] Thus, in their absence from the project's environmental review, the granted authorisation was unlawful.

In justifying its conclusion, the Court referred to the constitutional right to have the environment protected 'for the benefit of present and future generations, through […] measures that […] iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.[113] It acknowledged the link between the environment and socio-economic considerations through the concept of sustainable development. The Court noted that ensuring the use of natural resources and ecologically sustainable development will protect the environment,[114] especially when taking into consideration the substantial risk climate change poses to sustainable development in South Africa. This case significantly contributes to litigation supporting intergenerational equity by recognising that sustainable development is 'integrally linked with the principle of intergenerational justice' demanding States to protect the environment at present and for the future.[115] Pursuant to section 233 of the Constitution, the government had to interpret the domestic legislation in accordance with international law, involving Paris Agreement and other internationally recognised treaties.[116] Article 4 (1) (f) of the UNFCCC compels States parties to consider climate change impact in their relevant environmental policies and actions, and to employ suitable methods to minimise adverse effects on the environment and public health.

The case of *Earthlife Africa Johannesburg* had a significant impact and subsequent cases referred to the Court's judgement as a precedent for a climate change impact assessment for coal-fired power plants. One such case was *GroundWork* v *Minister of Environmental*

[111] Ibid, paras 1-2.
[112] Ibid, paras 90-91.
[113] Ibid, para 81, reference to section 24 of the South African Constitution.
[114] Ibid, para 82.
[115] Ibid.
[116] Ibid, para 83.

Affairs and Others.[117] The facts were similar to the *Earthlife Africa Johannesburg* case; the environmental organization *GroundWork* had filed a motion requesting a review of the authorisation to develop the "Khanyisa Project" -a 600 MW coal-fired power plant- that would consider the climate impacts of the plant. The Minister of Environmental Affairs' rejected *GroundWork's* application, which decision was then challenged by *GroundWork*.

Both cases are important because they illustrate the climate change litigation trend in South African Courts. South Africa is a major contributor to global GHG emissions resulting from the high-amount of mining and minerals processing.[118] Mitigation of those emissions is crucial as South Africa, along with other developing countries, is extremely vulnerable to the effects of climate change.[119] Fortunately, as proven by the foregoing cases, the national Courts' decisions respect the obligations under international environmental law and promote constitutional rights safeguarding the environment for the present and future generations.

3.4. Litigation addressing specific groups (Indigenous people's rights)

Climate change will not affect all human populations to the same extent. The harmful impacts will be mostly felt by those populations that are already in vulnerable situations, particularly indigenous people or segments of population with minority status and disabilities.[120] Indigenous people have a special relationship with their land and earth resources thus biodiversity loss induced by climate change will interfere with fundamental elements of their cultural identity, besides various other human rights.[121] Intergenerational justice involves the preservation of the environment and allocation of its natural sources equally between generations. This however is not only limited to environmental rights but socio-economic rights as well.[122] Therefore, protecting the environment is even more important in cases of local communities where their economy and cultural identity is exclusively based on the ecosystem.

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[117] *The Trustees for the time being of the GroundWork Trust* v *the Minister of Environmental Affairs and Others*, [2017], Petition before the High Court of South Africa, N.:61561/17.
[118] Ibid, para 34; Setzer and Byrnes, supra note 46, p. 9.
[119] *GroundWork Trust*, supra note 117, para 31.
[120] UN Human Rights Council, *Resolution adopted by the Human Rights Council 18/22 Human Rights and Climate Change,* 17 October 2011, A/HRC/RES/18/22, available at: https://www.ohchr.org/Documents/Issues/ClimateChange/A.HRC.RES.18.22.pdf.
[121] Lenzerini Federico and Piergentili Erika, '*A double-edged sword: climate change, biodiversity and human rights*', in Ottavio Quirico and Mouloud Boumghar (eds), "Climate Change and Human Rights: An international and comparative law perspective", (2017), Routledge, p. 163.
[122] See cases *Earthlife Africa Johannesburg*, supra note 110*; GroundWork Trust,* supra note117, for the interrelationship between the environment and the social and sustainable development as aforementioned.

There is considerable litigation on indigenous people's rights, which, albeit not always successful, has a great impact in the battle against climate change. Such litigation also illustrates the need for conservation of the environment and equal allocation of natural resources between present and future generations.

The first case where relief was sought for human rights violations arising from global warming due to acts and omissions of the United States (US) - as one of the largest GHG emitters - was the *Inuit Petition* before the Inter-American Commission on Human Rights (IACHR) in 2005.[123] The petition, filed by an Inuk woman, Chair of the Inuit Circumpolar Conference requested the Commission to endorse that the US adopt obligatory measures to limit its GHG emissions, and consider its impact on the Arctic when evaluating all main government actions. Moreover, the petition demanded the establishment and implementation of a plan that would protect Inuit culture and natural resources, in addition to providing the necessary support for Inuit people to adapt to the potential inevitable impacts of climate change. The petition was only successful in raising public awareness and was dismissed by the IACHR, because the petitioners were not able to provide sufficient evidence at the time to determine whether the alleged facts violated their fundamental human rights.[124] The IACHR only allowed a special hearing. The petition specified how the impending impacts of climate change on harvesting wildlife resources were of major concern for the health, socio-economic well-being, and cultural survival of indigenous people throughout the Arctic.[125] It gathered a lot of public attention and many cases followed with similar claims, proving that even unsuccessful litigation can have significant impact.

Another noteworthy case is the petition filed before the IACHR, in 2013, seeking relief from human rights violations of *Arctic Athabaskan Peoples* due to global warming and ice-glacier melting caused by black carbon emissions by Canada,[126] which is still pending.

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[123] *Petition to The Inter-American Commission on Human Rights Seeking Relief From Violations Resulting from Global Warming Caused By Acts and Omissions of the United States*, (8 December 2005), petition denied on 16 November 2006, http://climatecasechart.com/non-us-case/petition-to-the-inter-american-commission-on-human-rights-seeking-relief-from-violations-resulting-from-global-warming-caused-by-acts-and-omissions-of-the-united-states/, [Inuit Petition].

[124] Bodansky Daniel, '*Climate Governance beyond the United Nations Climate Regime*' in Bodansky, Brunnée and Rajamani, International Climate Change Law (OUP 2017), p. 287.

[125] *Inuit Petition*, supra note 123, para 39.

[126] *Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black*

According to the petition, Canada's failure to effectively regulate black carbon emissions contributes to global warming and results in the violation of the Athabaskans' rights to benefit from their culture, property, and preservation of health, as established by the American Declaration of Rights. Consequently, Canada allegedly violated the precautionary principle and its responsibility to avoid transboundary harm. The petition, filed by *Earthjustice* in the interests of the Arctic Athabaskan Council, requests on-site investigations and a hearing before the IACHR; a declaration by the Commission that Canada violates the American Declaration; and the establishment and implementation of a protection plan for the Athabaskan people.[127] Similar to the *Inuit Petition,* this case also confirms that cultural rights are of special importance to indigenous populations, as their cultural existence is usually a precondition for their physical survival.[128]

On 28 January 2016, the Inter-American Court of Human Rights (IACtHR) issued its judgment in the case of the *Kaliña and Lokono Peoples* v *Suriname*,[129] a landmark case for indigenous peoples' rights. This case was previously submitted to the IACHR collectively, by eight indigenous peoples' communities, consisting of Kaliña and Lokono peoples of the Lower Marowijne River. The IACHR published its decision in July 2013 and, after Suriname's non-compliance with its advised remedial measures, communicated the case to the Court in January 2014.[130] In its ruling, the Court held Suriname accountable for violations of rights guaranteed under the American Convention on Human Rights (ACHR).[131] The Court ordered guarantees of "non-repetition", compelling that Suriname implements measures to recognise the rights of all indigenous and tribal peoples under its jurisdiction 'so that similar acts are not repeated'.[132] The judgment constructively advances jurisprudence in some regards. In particular, its treatment of the rights of indigenous peoples regarding environmentally protected regions, and

Carbon by Canada, filed in 2013, [pending], http://climatecasechart.com/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions/.

[127] Ibid.

[128] Lenzerini and Piergentili, supra 121, p. 164.

[129] *Kaliña and Lokono Peoples* v *Suriname,* [2015] IACtHR Series C, No. 309.

[130] *Kaliña and Lokono Peoples* v *Suriname*, [2013], IACHR, Case 12.639, Report No. 79/13, available at: www.oas.org/en/iachr/decisions/court/12639FondoEn.pdf.

[131] *Kaliña and Lokono Peoples*, supra note 129, para 305.

[132] Ibid, paras 300, 305.

relevant international environmental law, is notable.[133] Equally, the repeated citation of the 2007 UN Declaration on the Rights of Indigenous Peoples (UNDRIP) strengthens its enforceability.[134] This is significant as Articles 12 and 29(1) of the UNDRIP provide for the preservation of natural reserves so that indigenous people conserve their way of life, language and customs among others. It also guarantees their right to preserve the environment and protect the productive capacity of their lands. Thus, States are obliged to develop and apply assistance programmes to ensure those rights.[135] It is worth mentioning that the remedies ordered by the Court present an unprecedented sensitivity towards indigenous peoples' rights and an inclination to a favourable interpretation of the ACHR to protect those rights. For instance, the Court has repeatedly recognized the importance of considering the customs of the indigenous peoples when implementing the ACHR, which is common practice in similar cases.[136]

On 16 January 2020, the Alaska Institute for Justice submitted a petition on behalf of five US Indian tribes from Louisiana and Alaska. Among others, the complaint was directed at the Special Rapporteurs on the Human Rights of Internally Displaced Persons, and the Rights of Indigenous Peoples. The petitioners argued that the US Government failed to protect them from forced displacement from their ancestral lands due to climate change.[137] They claimed that the US Government's inaction has failed to protect and promote the right of self-determination of the tribes throughout the adaptation strategies, involving relocation. Subsequently they asked for the U.S. Government to acknowledge the right to self-determination and integral sovereignty of all the tribes, to grant federal recognition, to allocate funding to the named Louisiana tribes, to hold oil and gas corporations accountable for damages, and to preserve, among other things, the tribes' land and cultural heritage.[138] The complaint also sought funding to implement the tribal-led resettlement process for Kivalina,

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[133] Fergus MacKay JD, '*The Case of the Kaliña and Lokono Peoples* v *Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*', (2018), Erasmus Law Review, 1, p. 31-42.
[134] Ibid.
[135] *Kaliña and Lokono Peoples*, supra note 129, footnote 230, 231; Articles 12, 29(1), UN GA, *UN Declaration on the Rights of Indigenous Peoples*: resolution/adopted by the GA, 2 October 2007, A/RES/61/295.
[136] See *Bamaca Velasquez* v *Guatemala*, IACtHR (2000) Series C, No 70, para 81; *Mayagna (Sumo) Awas Tingni* v *Nicaragua*, Series C, No 79 (31 August 2001), para 149.
[137] Rights of Indigenous People in Addressing Climate-Forced Displacement, 15 January 2020, p. 3-9 http://climatecasechart.com/non-us-case/rights-of-indigenous-people-in-addressing-climate-forced-displacement/.
[138] Ibid, 13-38.

while developing relocation institutional frameworks. Most of the claims stemmed from the UNDRIP, the Peninsula Principles on forcible displacement due to climate change, the Guiding Principles on Internal Displacement,[139] the Pinheiro Principles on Housing and Property Restitution,[140] and rights established in all principal international law instruments.[141]

The aforementioned cases highlight that the land, for indigenous people, 'is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy […] to preserve their cultural legacy and transmit it to future generations'.[142] Climate change and related biodiversity loss of ancestral lands represent a particularly severe violation of indigenous people's internationally recognised rights, which have a predominant cultural connotation.[143] Indigenous peoples' climate change litigation before the IACHR or the IACtHR has made a significant contribution to the fight for intergenerational equity as it increasingly affirms the right to a healthy environment as a human right that can be argued in court.[144]

4. Litigation against private corporations

Litigation against private corporations constitutes the last component of climate change litigation. Private corporations, and particularly the "Carbon Majors" that work in the energy sector, are responsible for almost up to 70 per cent of the global GHG emissions,[145] and thus climate litigation targeting those companies has been increased lately.[146] Such litigation usually aims to provide compensation to those most affected by climate change consequences and to hold the companies responsible for the costs of adaptation.[147] The majority of these complaints are grounded in the common law tort of nuisance, however alternative grounds may involve trespass, negligence and only recently, human rights law.[148] Nevertheless, as it will be demonstrated in this section, due to several obstacles, it is doubtful whether climate change

[139] UNHCR, *Guiding Principles on Internal Displacement*, 22 July 1998, ADM 1.1,PRL 12.1, PR00/98/109
[140] 28 June 2005, E/CN.4/Sub.2/2005/17.
[141] UNHCR, supra note 139.
[142] See also *Mayagna (Sumo) Awas Tingni Community,* supra note 136, para 149.
[143] Lenzerini and Piergentili, supra note 121, p. 164-165.
[144] Camila Perruso, '*The right to a healthy environment in international law'*, Sorbonne, 2018.
[145] Peel and Osofsky, supra note 66, p. 174.
[146] Savaresi Annalisa and Auz Juan, '*Climate Change Litigation and Human Rights: Pusing the Boundaries*' 9 Climate Law, (2019), p. 2258.
[147] Bodansky, supra note 124, p. 286.
[148] Burger and Wentz, '*Holding fossil fuel companies accountable for their contribution to climate change: Where does the law stand*?' (2018), 74 Bulletin of the Atomic Scientists, p. 397.

litigation against private corporations can be seen as an effective remedy to restore intergenerational justice in the fight against climate change.

In fact, climate change cases against private corporations in relation to human rights are hard to find. Paradoxically, it is difficult to hold the main actors liable for human rights violations due to GHG emissions independently of States.[149] On an international level, this is due to the lack of an efficient compulsory human rights framework dedicated to private corporations. On the contrary, States which have a duty to prevent infringements of human rights law, can be held responsible for harmful emissions by private corporations.[150] Consequently, a State is committed to adopting efficient laws and practices controlling actions and omissions not only by State actors but also by non-state agents, thus private corporations.[151] In *Social and Economic Rights Action Center and Center for Economic and Social Rights* v *Nigeria*, the IACHR underlined that 'governments have a duty to protect their citizens not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private companies'.[152] Regarding climate change, the European Committee of Social Rights (ECteSR) in the *Marangopoulos* case - where the Greek energy policy on GHG-emitting lignite mines was found in violation of the right to health under the European Social Charter - reinforced the duty to prevent human rights violations.[153] The aforementioned *Inuit* and *Athabaskan* petitions to the IACHR, are also focused on the State's failure to prevent GHG emissions by private corporations in violation of numerous human rights.[154]

On a national level, as evidenced by multiple cases, it is easier for private corporations to be held accountable for their emissions before domestic courts. In the case of *Gbemre,* a claim was filed before the Federal High Court of Nigeria against the Nigerian National Petroleum Corporation, the Shell Petroleum Development Company of Nigeria Limited, and

[149] Riddell Anna, '*Human rights responsibility of private corporations for climate change? The State as a catalyst for compliance'*, in Ottavio Quirico and Mouloud Boumghar (eds), "Climate Change and Human Rights: An international and comparative law perspective", (2017), Routledge, p. 65.
[150] *Velásquez-Rodríguez* v *Honduras*, [1988], IACtHR, para 176.
[151] Ottavio Quirico, Jurgen Brohmer and Marcel Szabo, '*States, climate change and tripartite human rights: the missing link'*, in Ottavio Quirico and Mouloud Boumghar (eds), "Climate Change and Human Rights: An international and comparative law perspective", (2017), Routledge, p. 7-37.
[152] *Social and Economic Rights Action Center and Center for Economic and Social Rights* v *Nigeria*, Communication 155/96, [2001], IACHR, para 69.
[153] *Marangopoulos Foundation for Human Rights (MFHR)* v *Greece*, [2005], ECteSR, Collective Complaint No 30/2005.
[154] Riddell, supra note 149, p. 65-66.

the Attorney General of the State of Nigeria.[155] The Court ruled that gas flaring by these companies during their oil production activities, involving GHGs, infringed the fundamental rights to life and dignity as stated in Sections 33 and 34 of the Nigerian Constitution, entangled with the rights to health and environment of Articles 16 and 24 of the African Charter of Human and Peoples' Rights (AChHPR).[156] The State was also found accountable for not implementing adequate legislative measures to prevent oil pollution. Hence, despite the State's responsibility, corporate responsibility for failing to respect human rights obligations was made possible in this case by the fact that emissions could be localized within the territory of the State and thus were easily attributable.[157] As the next case will demonstrate, the transboundary impact of climate change is one of the biggest challenges for successful climate litigation against private corporations.

In *Native Village of Kivalina* v *ExxonMobil Corp*,[158] an Alaskan tribal village filed a lawsuit against twenty-four major companies in the oil and energy sector, arguing that they should be held liable for the impact climate change had on the former's village and hence for adaptation costs. The common law tort of nuisance provided the legal ground for the request.[159] The District Court rejected their claim noting that the plaintiffs lacked standing and that the 'political question doctrine' prevented scrutiny of the nuisance claim.[160] The village of Kivalina appealed that decision, but the Appellate Court also dismissed the case.[161] Although unsuccessful, the case gained enormous public attention and raised awareness of climate change consequences within developed countries.[162]

Although the *Kivalina* case showed that litigation against private corporations is faced with multiple barriers, it set an example for many similar cases, including the pending case of *Lliuya* v *RWE*, the so-called "Huaraz Case".[163] The Peruvian farmer and mountain guide Saúl Luciano Lliuya has filed, for the first time in Europe, a lawsuit against a company responsible

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[155] *Gbemre* v *Shell Petroleum Development Company Nigeria Limited and Others*, [2005], NgHC, No FHC/B/CS/53/05.
[156] Organisation of African Unity (OAU), AChHPR ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).
[157] Riddell, supra note 149, p. 66.
[158] *Native Village of Kivalina* v *ExxonMobil Corp*., 663 F. Supp. 2d 863, 883 (N.D. Cal. 2009).
[159] Quin M. Sorenson, '*Native Village of Kivalina v. ExxonMobil Corp.: The end of "climate change" tort litigation?*' 44 Trends (2013), p. 1.
[160] *Native Village of Kivalina*, supra note 158, para 883.
[161] *Native Village of Kivalina* v *ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012).
[162] Mayer, supra note 48, p. 248.
[163] *Saúl Luciano Lliuya* v *RWE AG*, Case No. 2 O 285/15 Essen Regional Court, (2015), [pending, on appeal], http://climatecasechart.com/non-us-case/lliuya-v-rwe-ag/.

for climate change, the German utility RWE. Lliuya claims that RWE's massive emissions threaten his family's well-being, his property rights, as well as a large part of his home city of Huaraz. The court of first instance dismissed the case, noting that there was no 'linear chain of causation' between RWE's emissions and Lliuya's situation.[164] The decision was appealed and is currently pending.

Both the *Kivalina and the Huaraz* cases highlight one of the biggest obstacles for climate change litigation against private corporations, which is establishing a linear causal chain between the defendant's GHGs emissions and the particular climate change impacts suffered by the plaintiff.[165]As a result of the outlined barriers, most of the cases against private corporations have been fruitless. Even if they failed to achieve the desired outcome, these cases garnered significant media attention. Such attention could cause damage to the credibility of the corporation and potentially lead to financial or reputational costs, which could in turn result in prevention measures and mitigation of emissions to avoid future allegations.[166] Subsequently, litigation could eventually have an indirect impact on the fight against climate change. While until now, the most effective path for controlling the actions of a private corporation, was to be found only through States' responsibility to protect human rights,[167] a recent court ruling presents a silver lining.

On 29 January 2021, in the case of *Akpan* v *Royal Dutch Shell/Shell Nigeria,* [168] Shell Nigeria was held responsible by the Dutch Court of Appeal for two oil spills in Niger Delta and was found liable to pay compensation. Royal Dutch Shell was found to have a duty of care to the villagers affected by the oil spill and together with Shell Nigeria will be held liable for any failure to prevent future oil spills.[169] This judgement is momentous as it established for the first time that parent companies can be accountable for the malfeasance of their subsidiaries, shaping a positive direction on extraterritorial environmental corporate liability for future court rulings. This is also supported by the UK's Supreme Court ruling on 12 February 2021, which allowed the case against Royal Dutch Shell and its Nigerian subsidiary to proceed before the

[164] Ibid, unofficial English translation, Grounds for the Decision II, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision-1.pdf.
[165] Ibid; *Native Village of Kivalina*, supra note 158, paras 20-21.
[166] Setzer and Byrnes, supra note 46, p. 25.
[167] Riddell, supra note 149, p. 66.
[168] [2013], C/09/337050 / HA ZA 09-1580, https://elaw.org/system/files/final-judgment-shell-oil-spill-ikot-ada-udo.pdf.
[169] Shell lawsuit (re oil pollution in Nigeria), Business & Human Rights Resource Center, https://www.business-humanrights.org/en/latest-news/shell-lawsuit-re-oil-pollution-in-nigeria/.

UK Courts.[170] Outstandingly, the Court's judgement indicates that Shell is liable for the pollution distressing the Ogale and Bille communities. These latest decisions are extremely positive and could help overcome the aforementioned obstacles of extraterritoriality and linear causal link, as they allowed for plaintiffs to stand for present and future rights to a healthy environment before Courts of extraterritorial jurisdiction.

5. Conclusion

The cases analysed demonstrate that human rights arguments are being used in an increasing number of climate change cases.[171] As the consequences of environmental degradation become evident in many parts of the world, the concerns regarding the rights of future generations are progressively augmented. As the UN High Commissioner for Human Rights (UNHCHR) stated.

> *'Climate change is a reality that now affects every region of the world. The human implications of currently projected levels of global heating are catastrophic. Storms are rising and tides could submerge entire island nations and coastal cities. Fires rage through our forests, and the ice is melting. We are burning up our future – literally.'*[172]

Brown Weiss stated years ago that climate change challenges the justice between the present and future generations.[173] Now more than ever, human rights climate change litigation is focusing on intergenerational equity and portrays the legal content of the rights of future generations. Nevertheless, judicial decisions over the years show that the legal position of future generations remains unresolved. The questions that the great moral philosophers have posed regarding the representation of future generations, and their interests are not always answered through Courts' rulings. The legal standing of future generations is often questioned and depends upon the establishment of a linear causal link between the victim, the environmental damage and the human act that caused it.[174] However, as we can rely on the continued existence of essential needs for clean air, water, food, and a healthy environment,[175]

[170] Ibid.
[171] Setzer and Byrnes, supra note 46, p. 1.
[172] Michelle Bachelet, UNHCHR, 9 September 2019, Opening Statement to the 42nd session of the Human Rights Council.
[173] Brown Weiss, supra note 6.
[174] See the case of *Teitiota,* supra note 70, analysed here in p. 13-14.
[175] Karnein, supra note 22.

the fundamental interests of future generations are not questioned. Remarkably, many of the cases analysed expand the law through interpretation to include the notion of intergenerational equity. This allows the plaintiffs to stand for the rights and interests of future generations, even in cases where there is no present threat but a great likelihood of a severe threat in the future.[176]

Fruitful or not, climate cases outlined in this paper have proved to be both a robust regulatory and enforcement tool when addressing intergenerational equity. Recent successful litigation, like the *Urgenda* case, provide an even greater impetus for future litigation. However, even unsuccessful cases could have indirect impacts and influence future decisions. For instance, in the *Teitiota* case, the statement that environmental degradation could lead to refugee law protection presents a glimmer of hope for future successes under different circumstances. A strong dissenting decision, or a potential precedent set for future cases, could eventually achieve intergenerational equity.[177]

Nonetheless, climate change obligations are hard to apply against the most polluting actors, that is, private corporations. The human rights responsibilities of private entities are centred around the State, which ultimately is answerable for the violations caused due to GHG emissions by the corporations. Although internationally, there are no effectively binding human rights procedural mechanisms, domestically human rights obligations are enforceable. While until now it has proven difficult to prove a causal link and attribute delocalised GHG emissions to private corporations,[178] the latest decisions regarding Royal Dutch Shell and Shell Nigeria mark a turning point in climate change litigation concerning human rights. Though effective, holding private corporations accountable through States' responsibility for failing to prevent their emissions could be problematic due to extraterritoriality.[179] The two above-mentioned cases could present a light paradigm for subsequent rulings. Nonetheless, many hurdles need to be overcome, policy discretion being among them.

On the whole/Overall, climate change litigation can be an effective remedy in the fight against climate change and in ensuring intergenerational equity, while filling the lacuna of a common legal framework establishing the rights of future generations. Climate litigation is positively increasing, and although the current Covid-19 crisis could delay or decrease new or

[176] See section 2.3.
[177] Setzer and Byrnes, supra note 46, p. 28.
[178] Riddell, supra note 149, p. 68.
[179] Ibid; Savaresi and Auz, supra note 146, p. 37.

already filed claims,[180] it could also motivate plaintiffs to find new grounds for bringing cases by connecting the current health emergency to the climate emergency.[181]

[180] See '*Saúl v RWE – The Huaraz Case'*, delay on the selection of evidence, available at: https://germanwatch.org/en/huaraz.
[181] Setzer and Byrnes, supra note 46, p. 2.